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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-260

L. N. McDONALD and RAYMOND L. LAIRD,
Petitioners,

v.

SANTA FE TRAIL TRANSPORTATION COMPANY and TEAMSTERS FREIGHT, TANK LINE and AUTOMOBILE INDUSTRY EMPLOYEES, LOCAL UNION NO. 988,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT SANTA FE TRAIL TRANSPORTATION COMPANY

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BRIEF FOR RESPONDENT SANTA FE TRAIL TRANSPORTATION COMPANY

QUESTIONS PRESENTED

The questions presented are as stated by Petitioners:

1. Whether dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged black employee raises a claim under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*

2. Whether white employees who were discharged for alleged misappropriation of company property when a similarly charged black employee was not discharged, have standing to sue under the Civil Rights Act of 1866, 42 U.S.C. § 1981.

STATEMENT OF THE CASE

Petitioners have glossed over or neglected to mention several matters which we regard as of considerable importance.

They pleaded their case in the District Court as a class action not only for themselves but also "on behalf of other persons similarly situated." (App. p. 35.) They sought declaratory and injunctive relief from an allegedly discriminatory "policy, practice, custom or usage" of imposing more severe discipline upon white employees than that imposed on black employees. (App. pp. 36, 41.)

Their effort to present a "class action" was rejected by the District Court. (App. p. 104.) There has since been no move to revive it. No attempt was ever made to press the "pattern and practice" charge of imposing disparate discipline on the basis of race.

So Petitioners stand before this Court by themselves. For the purpose of decision here, they were dismissed from our employ for "misappropriating company property"—that is to say, stealing.[1] No criminal charges were ever lodged, although it should be noted that theft of company property with a value in excess of $200.00 is a felony under Texas law. Article 31.03, Vernon's Texas Codes Annotated—

[1] Technically, it was not "misappropriation of company property" which was involved but rather misappropriation from a shipment being handled by Respondent Santa Fe Trail Transportation Company. (App. p. 65.)

Penal. Both courts below noted that neither Petitioner contended he had been wrongfully charged. (App. pp. 107, 122.) At this late date they do attempt a rather weak protest to the contrary at pp. 18-19, n. 37, of their Brief, but we believe the findings of the courts below must be accepted.

Although not a party to these proceedings, a very interested bystander is one Charles Jackson, a black employee of Respondent Santa Fe Trail Transportation Company ("Santa Fe") at the time the events underlying this case transpired. Petitioners alleged in their complaint that Jackson had also been charged with theft of company property along with them but they were fired and he was not, the apparent disparity in discipline due, they say, to their white and his black skin. (App. p. 38.) There is nothing in the record to indicate, however, that Jackson had failed to dispute the alleged charge of participation in a theft of company property.

Finally, we should like to point out that no one argued in the courts below that whites do not have standing to sue under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, and neither the District Court nor the Court of Appeals ruled that whites have no rights under Title VII. The courts did rule that *these particular white Petitioners* had failed to state a claim upon which Title VII relief could be granted.

SUMMARY OF ARGUMENT

On the basis of the entire record, Petitioners failed to advance any support whatever for their allegations that they had been disciplined more severely because they are white than was a black co-worker. The record convincingly demonstrates that Petitioners could not sustain a claim on which relief could be granted under Title VII of the Civil Rights Act of 1964.

If review must be restricted to the pleadings, Petitioners still fell short of presenting a case under Title VII. They themselves alleged that they had been discharged from employment for theft of company property, and they have not denied the truth of the charge against them. Under such circumstances, we submit that in order to plead a prima facie case Petitioners must, considering the wide discretion of management in disciplining its employees, go further than merely allege that a black co-worker was similarly charged with theft of company property and was not discharged. In substance, Petitioners are not complaining about what happened to them but about what did not happen to someone else.

Even if race may have been one of a number of factors in our determination that, all things considered and exercising our discretionary disciplinary authority, we would not discharge a black employee who allegedly was involved with Petitioners in a theft of company property, there was still no violation of Title VII. If such be regarded as "reverse discrimination," it is nevertheless not "invidious" under the circumstances of this particular case and not contrary to Title VII.

Absolute racial neutrality in all employment decisions may be a desirable theoretical objective but it is not only impractical it would be inconsistent with and counterproductive to the goals of Title VII. "Affirmative action" is presently an accepted aspect of the on-going civil rights program of the United States. By definition it involves at least some measure of preference of or advantage for blacks and other racial minorities in connection with employment decisions. An interpretation of Title VII which would require all employment decisions to be made on the basis of competence alone would mean the end of "affirmative action"

and a marked slowing of the pace of progress of blacks and other racial minorities. Congress never intended Title VII to have such a result.

The wording of the pertinent part of the Civil Rights Act of 1866, 42 U.S.C. § 1981, together with its historical context and purpose, indicate that Congress did not intend to extend its protection to whites. Its purpose was only to protect blacks. Accordingly, whites cannot maintain a cause of action under § 1981. The lower court decisions which have so held are correct. Those to the contrary either involve especially unique facts and are, therefore, distinguishable, or they were incorrectly decided.

ARGUMENT

I. DISMISSAL OF WHITE EMPLOYEES WHO DO NOT DENY CHARGES OF MISAPPROPRIATING COMPANY PROPERTY WHILE NOT DISMISSING A SIMILARLY CHARGED BLACK DOES NOT, STANDING ALONE, RAISE A JUSTICIABLE CLAIM UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

In a very real sense, Petitioners are complaining less about what happened to them than about what did not happen to Jackson. If he had been fired when they were, this case would never have been filed. Although Petitioners seek reinstatement with lost wages (App. p. 41.), presumably the basic wrong of which they complain could be remedied not by reinstating them but by firing Jackson. Viewed in this light, we have difficulty seeing this case as one worthy of this Court's attention.

That difficulty becomes more acute when we consider that this case has come to the Court on the basis of a successful Motion to Dismiss under Rule 12(b) of the Federal Rules of Civil Procedure, as a result of which we may be com-

pelled to accept that view of the facts most favorable to Petitioners as stated in their Complaint. The District Court, however, had a good deal more to consider than the skeletal allegations of the Complaint—as we will shortly demonstrate. When these are considered, it is apparent that the case which Petitioners would have this Court review is a purely hypothetical one. The real case is quite different.

A. On the Record as a Whole, Petitioners Plainly Failed to State a Cause of Action Under Title VII

Our successful motion in the District Court was styled a Motion to Dismiss. Insofar as the Complaint was based on § 1981, it was dismissed for want of jurisdiction under Rule 12b(1). (App. p. 114.)[2] The Title VII count was dismissed for failure to state a claim upon which relief could be granted. (App. p. 117.) In this connection, the District Court was required to accept as true the well-pleaded material facts alleged in the Complaint, taking that view of the case most favorable to Petitioners. *Scheuer* v. *Rhodes*, 416 U.S. 232, 236-37 (1974); *Cruz* v. *Beto*, 405 U.S. 319, 322 (1972); *Gardner* v. *Toilet Goods Ass'n, Inc.*, 387 U.S. 167, 172 (1967); *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). However, Rule 12(b) allowed the court to treat the motion as one for Summary Judgment under Rule 56, Fed. Rules Civ. Proc., and in connection therewith to consider all the depositions, answers to interrogatories or affidavits in the file in addition to the naked allegations of the Complaint. Rule 56(e). Even if the § 1981 motion is to be viewed as raising jurisdictional issues, the District Judge was free to resort to matters beyond the pleadings. *Land* v. *Dollar*,

[2] If dismissal was appropriate, it should have been for failure to state a claim upon which relief could be granted rather than for want of jurisdiction. *Montana-Dakota Utilities Co.* v. *Northwestern Publ. Serv. Co.*, 341 U.S. 246, 249-50 (1951); *see Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 213, n. 9 (1974) (Douglas, J., dissenting).

330 U.S. 731, 735, n. 4 (1947); *Pintozzi* v. *Scott*, 436 F.2d 375, 378 (7th Cir., 1970); *Troup* v. *McCart*, 238 F.2d 289, 292 (5th Cir., 1956).

There was quite a bit more to consider than the bare bones of the complaint. There had been more than two and a half years of pre-trial activity, and the file contained not only the Complaint and Answer, but also Motions, Memoranda, Briefs, Interrogatories, Answers to Interrogatories, and Depositions. All this material was provided the Court of Appeals and much of it is contained in the printed Appendix which comprises the record furnished this Court.

We believe that District Judge Bue did, in fact, review the entire record and dispose of this case as a summary judgment. At one point in his Modified Memorandum and Opinion of June 13, 1974, he stated:

> "With regard to plaintiff's class action allegations, *the Court has considered the entire record* and particularly plaintiffs' allegations and concludes that the class of white persons who are employed or might be employed by The Santa Fe Trail Transportation Company in Houston, Texas, who are members or might become members of the Local 988, who have been discharged upon charges of misappropriating company property is not so numerous as to make joinder of all such members impracticable. Therefore, the Court concludes that this action may not be maintained as a class action. Fed. R. Civ. P. 23 (c) (1)." (App. p. 114, emphasis supplied.)

Petitioners themselves go beyond the narrow limits of the pleadings at notes 37, 38, and 39, pp. 18-19, of their Brief.

Viewing the record as a whole, we submit that the courts below did—and this Court should—take into account the following:

1. Our Answer to the "Second Amended Complaint" specifically denied that Petitioners were discharged "by reason of their caucasian race." (App. p. 65.)

2. Furthermore, we answered that:

> "This defendant denies that plaintiffs, along with one negro employee, Charles Jackson, were all charged jointly and severally with misappropriating company property, but admits that a general investigation of misappropriated cargo and cargoes, including ten (10) cases of six (6) one-gallon cans of anti-freeze, was instituted and conducted, along with an investigation of possible violation of company rules, which investigation did include plaintiffs, Laird and McDonald, and employee, Charles Jackson, and others." (App. p. 65.)

3. And additionally stated that:

> "This defendant admits that on or about October 2, 1970, plaintiffs, L. N. McDonald and Raymond Laird, were discharged, and admits that negro employee, Charles Jackson, was not discharged, but denies any discrepancy in disciplinary sanctions among or between these employees by reason of their race." (App. p. 66.)

These answers are consistent with those pleaded by the defendant Union. (App. p. 59-60.)

4. In sworn Answers to Interrogatories (App. pp. 32-34.) we informed Petitioners and the courts:

> "I. (a) L.N. McDonald was discharged because of his dishonesty in the theft of company freight off of company equipment on company property and for violation of company rules.
>
> "(b) Raymond Lee Laird was discharged for failure to properly perform his duties, exercising poor judgment as General Dock Foreman and for violation of company rules.
>
> • • • • •

> "XI. Charles Jackson was not charged with misappropriating company property.
>
> "XII. Plaintiffs were discharged for reasons other than race. The reasons are outlined in Answer to Interrogatory No. 1, and the company has written Statements of the plaintiffs in support thereof."

Despite two and a half years of pre-trial activity, Petitioners never came forward with any facts to support their claim of racially disparate treatment. Reviewing this one-sided record, Judge Bue could properly have rendered summary judgment for Santa Fe. Rule 56(e) allows the court, in a case such as this, to pierce the pleadings and determine that a party cannot possibly support his unfounded allegations. *First Nat'l Bank of Ariz.* v. *Cities Service Co.*, 391 U.S. 253, 288-90 (1968); Advisory Committee Notes to 1963 Amendments, Fed. Rules Civ. Proc., Rule 56, 28 U.S.C.A. 416; *Modern Home Institute, Inc.* v. *Hartford Accid. & Indemnity Co.*, 513 F.2d 102, 109, 114 (2nd Cir., 1975); *Abiodun* v. *Martin Oil Service, Inc.*, 475 F.2d 142, 144 (7th Cir., 1973), *cert. den.*, 414 U.S. 866 (1975). *Cf., Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 160 (1970).

The court indicated in its Memorandum and Order of January 4, 1975, that it was only assuming, *arguendo,* that Jackson was equally culpable with Petitioners and that their discharge was racially motivated; it invited the parties to explore that question. (App. p. 94.) Nonetheless, Petitioners produced no evidence to back up their charges.

Since there was no genuine issue as to either the cause of the disparate treatment accorded Messrs. Laird, McDonald and Jackson or as to racial motivation, Santa Fe was en-

titled to summary judgment as a matter of law. Rule 56(c), Fed. Rules Civ. Proc.; *Tyler* v. *Vickery*, 517 F.2d 1089, 1094-95 (5th Cir., 1975).

B. Even if Review is Limited to the Pleadings in Their Present Posture, Petitioners Have Plainly Failed to State a Cause of Action Under Title VII

Most of Petitioners' Brief on the Civil Rights Act of 1964 question is misdirected to the broad question of whether whites as well as minorities are entitled to Title VII's protection. This case presents a much narrower question.

To simplify matters as best we can, we concede that as a general proposition whites are, under appropriate circumstances, protected against racially discriminatory employment decisions by Title VII.

However, that general proposition means little or nothing in the context of the case at bar. Petitioners are not hapless whites discharged at an employer's whim—they are whites charged with stealing property entrusted to the custody of their common carrier employer, and in the courts below they did not deny the truth of these charges. They have abandoned their fruitless allegation that we engaged in a pattern and practice of discriminatory discipline favoring blacks at the expense of whites. And they have never claimed that their discharges were somehow a subterfuge or pretext on our part to cover up a racially discriminatory employment decision.

Petitioners are white and Jackson is black. We fired them for stealing but did not fire him. We admit that our action may superficially smack of discrimination. But we submit that white men fired under these circumstances must plead and prove more than a superficial case if they are to state

a claim upon which Title VII relief might be granted. We think that is the import of the decisions of the courts below and we think they were correct.

The critical factor is that our decision was reached in exercise of our unquestionable right to discipline dishonest employees. Management must be and is vested with wide discretion in administration of discipline. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937); *Associated Press* v. *NLRB*, 301 U.S. 103, 132 (1937); *NLRB* v. *Ogle Protection Service, Inc.*, 375 F.2d 497, 505 (6th Cir., 1967), *cert. den.*, 389 U.S. 843.

Standing alone, our decision to fire Petitioners for stealing is unassailable. In exercise of our disciplinary discretion, however, we did not discharge Jackson. There may have been any number of reasons having nothing whatever to do with race for the apparent leniency extended to him. But it is this apparent leniency in favor of a third man upon which Petitioners base their entire case.

Surely Congress did not intend to afford Title VII relief on such a flimsy basis. This Court's comparatively recent decision in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), is instructive. There the company refused to re-employ a black on the basis of unlawful conduct directed against it while he had been laid off during a general reduction in work force. He claimed that refusal to rehire was racially motivated in violation of § 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), and was in retribution for his civil rights activities in violation of § 704(a) of the Act, 42 U.S.C. § 2000e-3(a). The Court enunciated a specific test which one must satisfy in order to make out a prima facie case of discrimination, a test which the respondent, Green, had met. For its part, the

company contended that it had refused to rehire Green because of his unlawful conduct against it while he was laid off. This the Court ruled was sufficient to meet the company's burden of proof at the opening of the case and met Green's prima facie discrimination case. 411 U.S. at 803. With respect to the weight to be accorded the company's reason for refusing to rehire Green, the Court said:

> ". . . [W]e think the court below seriously underestimated the rebuttal weight to which petitioner's reasons were entitled. Respondent admittedly had taken part in a carefully planned 'stall-in' designed to tie up access to and egress from petitioner's plant at a peak traffic hour. [Footnote omitted.] Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it."[1] 411 U.S. at 803.

On the same point, the Court said:

> "Petitioner's reason for rejection thus suffices to meet the prima facie case, but the inquiry must not end here. While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by § 703(a)(1). On remand, respondent must . . . be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the 'stall-in' were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races." 411 U.S. at 804.

Finally, by way of summary, the Court directed:

> ". . . In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons

> for his rejection were in fact a coverup for a racially discriminatory decision." 411 U.S. at 805.

In the case at bar, Petitioners did not cause a traffic jam. They stole property entrusted to the custody of their common carrier employer. One, Laird, occupied a supervisory position as a Dock Foreman; the other, McDonald, was a truck driver. Both therefore had been entrusted with a good deal of responsibility with respect to the security of shipments handled by Santa Fe. The pleadings are silent as to the position of Jackson, the black who was not discharged.

Petitioners, in the course of filing three successive complaints (App. pp. 4, 21, 35.), had more than enough opportunity to plead a case which would have more to it than a bare allegation that they are white and were disciplined differently than a black co-worker. They have not alleged with any particularity the degree of similarity, if any, between their roles in the theft involved in their discharges and the part played by Jackson.

Petitioners themselves pleaded that they had been discharged for theft, and when they failed to deny the validity of the charges against them they refuted what otherwise might have been the first block in the foundation of a prima facie case. Accepting the premise, which for present purposes we assume we must, that Petitioners were discharged for stealing, our reason for discharging them must be accorded great weight—it is "presumptively valid" and, in the absence of something more, will serve to rebut what might otherwise appear to be a prima facie case. *McDonnell Douglas Corp.* v. *Green, supra,* at 803, 804, 805.

We cannot fairly say what "more" one in the position of Petitioners must allege in order to plead a prima facie case because no one—not even this Court—can foresee the factual variations which future litigation may produce. But

whatever "more" might be in any other case, these particular Petitioners have failed the test. The courts below properly ruled that they failed to state a claim which would entitle them to relief under Title VII of the Civil Rights Act.

There is another but related aspect of this Court's decision in *McDonnell Douglas Corp.* v. *Green, supra,* which should also be recalled. The Court there spelled out very carefully the essentials of a prima facie case under Title VII:

> "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802.

The Court was careful to warn that this specification "is not necessarily applicable in every respect to differing factual situations." *Id.* n. 13.

Taken literally, a white would usually be hard put to meet the first requirement that he show he was a member of a racial minority, although there have been cases of whites in black-dominated or controlled enterprises who could plead such a case. *WRMA Broadcasting Co.* v. *Hawthorne,* 365 F.Supp. 577 (M. D. Ala., 1973). So, if applied literally and uniformly, this requirement would almost automatically preclude whites from any Title VII relief on the basis of race. Accordingly, we do not believe this Court intended this hurdle to be surmounted in a case such as that at bar.

The second requirement would appear to be one which would be applicable in most every case, certainly including this one—that a complainant must be qualified for the job he wants to get or keep. Our judgment that Petitioners were no longer qualified on this score can hardly be faulted, for they demonstrated that they could not be reliably entrusted with the property of others in possession of their common carrier employer. They are compelled to try to implicate a fellow employee in their own unlawful conduct in an effort to establish that he is equally untrustworthy but was not penalized as severely as they because of his race. We cannot imagine that Congress was much concerned with the plight of men in their position and intended to accord them Title VII protection. They fail the prima facie test prescribed in *McDonnell Douglas.*

1. Absolute racial neutrality in all employment decisions would retard rather than advance the primary purpose of Title VII

On a number of occasions this Court has spoken in sweeping terms of the basic objective of Title VII. Turning again to *McDonnell Douglas,* we see that the Court said:

> "There are societal as well as personal interests on both sides of this [racial equality in employment] equation. The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that *Title VII tolerates no racial discrimination, subtle or otherwise.*" 411 U.S. at 801. (Emphasis supplied.)

As an abstract ideal, perhaps *every* employment or personnel decision should be absolutely color-blind. But this is a practical world, and few parts of it are more practical than where employment or personnel decisions are made.

We submit that absolute racial equality under every conceivable circumstance might very well be counter-productive. Mr. Jackson would certainly have thought it so if we had concluded that the law compelled us to fire him as well as Petitioners—all under the banner of racial equality.

Assuming for the moment that our local manager who made the decision to fire Petitioners but retain Jackson had been influenced to some slight degree by Jackson's race, perhaps thinking to himself, "Jackson's black, all things considered, we'll give him a break," we cannot believe that we thus ran afoul of the intent of Congress expressed in Title VII. We are a government contractor subject to Executive Order 11246, as amended, 3 C.F.R. 169, which is the basis of an extensive civil rights program apart from the Civil Rights Acts of 1866 and 1964, 41 C.F.R. Chapter 60. The sanctions prescribed in that Order include cancellation of the underlying government contracts and ineligibility for future contracts. E.O. 11246, *supra*, §§ 209(5), (6); 41 C.F.R. § 60-1.30. If, in the action of which Petitioners complain, we violated Title VII, is it possible that under Executive Order 11246 we might lose our government contracts because we may have decided, all things considered, to give Jackson a "break?"

2. Absolute racial neutrality in all employment decisions would be inconsistent with federal policy as reflected in "affirmative action" programs

In determining whether Congress intended in Title VII that each and every employment decision must be absolutely color-blind, this Court should consider the impact of such a ruling on the various forms of "affirmative action" programs being promoted or approved across the country by the Department of Justice, Department of Labor, the federal courts, and especially the Equal Employment Opportunity Commission.[3] The very heart of each of these programs is to encourage or even require employment decisions which, insofar as they relate to race, are anything but color-blind. They customarily call for employers to favor minorities to a greater or lesser degree, usually until some specific minority employment "profile" has been secured. An excellent pamphlet has been published by the EEOC—*Affirmative Action and Equal Employment, A Guidebook for Employers, Volume 1,* U.S. Government Printing Office: 1974-559-400. In its Foreword, at page 1, EEOC states in part:

> "Equal Employment opportunity is the law. It is mandated by Federal, State and local legislation, Presidential Executive Orders and definitive court decisions.
>
> "However, there remains a need to communicate to employers why and how equal employment opportunity

[3] Affirmative action plans which, in one way or another, require or promote hiring and promotion of minorities, especially blacks, are common. Employers doing more than a minimum amount of business with the federal government are required by the Department of Labor to establish minority hiring goals and timetables, Executive Order No. 11246, 3 C.F.R. 169; 41 C.F.R. § 60-2.12; *see Contractor's Ass'n of Eastern Pa.* v. *Secretary of Labor*, 442 F.2d 159 (3rd Cir., 1971), *cert. den.*, 404 U.S. 854. The Equal Employment Opportunity Commission requires employers to report the number of minority and white employees, 29 C.F.R. § 1602.7, and, along with the Justice Department, views specific hiring and utilization goals as a proper basis for settling discrimination claims by consent decree. *United States* v. *Allegheny-Ludlum Industries*, 517 F.2d 826, 835 (5th Cir., 1975); *EEOC* v. *American Tel. & Tel. Co.*, 8 FEP 431:73, 74 (1973).

Numerous federal courts have imposed hiring quotas favoring minorities as relief for past patterns and practices of racial discrimination. *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017, 1026-28 (1st Cir., 1974), *cert. den.*, 421 U.S. 910 (1975); *Carter* v. *Gallagher*, 452 F.2d 315, 331 (8th Cir., 1972); *United States* v. *Ironworkers, Local 86*, 443 F.2d 544, 553-54 (9th Cir., 1971), *cert. den.*, 404 U.S. 984; *United States* v. *Central Motor Lines, Inc.*, 325 F. Supp. 478, 479 (W.D. N.C., 1970). *See Morrow* v. *Crisler*, 491 F.2d 1053, 1056 (5th Cir., 1974), *cert. den.*, 419 U.S. 895 (1975).

> usually requires positive, *affirmative action* beyond establishment of neutral 'nondiscriminatory' and 'merit-hiring' policies."

The obvious purpose of these "affirmative action" programs—in whatever form they may be cast—is to quicken the pace at which previously disadvantaged minorities may achieve their rightful place in the nation's economic life. *EEOC Affirmative Action Guidebook, supra,* at 3. Without them, the rate of progress to racial equality in employment would be painfully slow. If hiring, promotion, or discharge decisions cannot lawfully be affected to even the slightest degree by racial considerations, if these decisions must be made in all cases on the basis of merit alone, those historically disadvantaged by the shackles of racial discrimination will for years to come still have steeper hills to climb than whites. The EEOC, in its *Affirmative Action Guidebook,* and elsewhere, has made it clear that it does not understand Title VII to require strict racial neutrality in all employment decisions, and its role in the administration of the Act entitles its interpretation to "great deference." *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 433-34 (1971).

"Affirmative action" is not universally acclaimed. Like most if not all social programs which rock the status quo, it can be, and no doubt some have been, more abusive and destructive than constructive.[4] We are not suggesting that all forms of "reverse discrimination" would be saved if promoted under the banner of "affirmative action." Not at all! The essence of workable and acceptable programs

[4] A case recently filed in the United States District Court for the Northern District of Ohio, Eastern Division, may illustrate this dramatically. *Malone* v. *Hall and Shippers Dispatch, Inc.,* No. C75-1084. There a motor carrier is seeking to recover substantial money damages from the United States, alleging that a serious accident was caused by an incompetent driver the company was compelled to hire by the EEOC.

must be reasonableness, fundamental fairness, and common sense.[5]

Perhaps the key may be the word "invidious." It is not to be found in the text of the Civil Rights Act of 1964, but it appears regularly in the opinions of this and other courts. *Griggs* v. *Duke Power Co., supra,* at 431; *Loving* v. *Virginia,* 388 U.S. 1, 10 (1967); *Johnson* v. *Railway Express Agency, Inc.,* 421 U.S. 454, 457-58, 459, 461 (1975).

The customary context in which it appears is a statement to the effect that Title VII "creates statutory rights against invidious discrimination in employment and establishes a comprehensive scheme for the vindication of those rights." *Johnson* v. *Railway Express Agency, Inc., supra,* at 457-58.

Perhaps "invidious" has no significant meaning of its own. It may be that it has become a phrase of art with no real substance except to imply that all racial discrimination is "invidious." But the manner and context in which the word has been used convince us otherwise. We believe it does mean something. Mr. Justice Douglas seemed to be saying as much in his opinion in *DeFunis* v. *Odegaard,* 416 U.S. 312, 344 (1974):

> ". . . [O]ur task ends with the inquiry whether, judged by the main purpose of the Equal Protection Clause—the protection against racial discrimination—there has been an 'invidious' discrimination."

Although the majority thought *DeFunis* moot by the time it reached the Court, Mr. Justice Douglas' views are instructive even though stated by way of dissent. We also

[5] Nor are we to be understood as suggesting that "affirmative action" as such has any place in the discipline area. It does not. We refer to it only to illustrate the ultimate weakness of the position that *all* employment decisions must as a matter of law be absolutely racially neutral.

recognize that his position was expressed in terms of 14th Amendment rather than Title VII considerations, but this is a distinction without a difference in the context of the instant case. *United States* v. *Chesterfield County School Dist.*, 484 F.2d 70, 73 (4th Cir., 1973), and cases there cited; *but see Satty* v. *Nashville Gas Co.*, 522 F.2d 850, 855 (6th Cir., 1975); *Tyler* v. *Vickery*, 517 F.2d 1089, 1097-99 (5th Cir., 1975). In effect, he said that although the admissions procedures adopted by the University of Washington Law School did accord minorities an advantage not enjoyed by whites, they were not unlawful because DeFunis was not "invidiously discriminated against because of his race." 416 U.S. at 344.

This view, we know, opens the door to a host of difficult problems. What is "invidious" and what is not? A comprehensive definition which might resolve all the problems which will surely arise in this area in the years and decades ahead is not possible. As various factual situations may be presented to the courts, a workable standard will gradually evolve.

Certain basic guidelines are possible now. Only extraordinary circumstances could take discrimination against a minority out of the "invidious" class. On the other hand, while across-the-board discrimination *in favor of* minorities could never be condoned consistent with Title VII and the evident intent of Congress, such discrimination under special circumstances or in isolated cases which cannot reasonably be said to burden whites as a class unduly, may not be "invidious" and may be acceptable at this time in our history. Thus, reasonable "affirmative action" programs would be preserved in order to remedy the wrongs of the past, and isolated cases like that at bar, in which a black

man may have been given a "break", would not run afoul of Title VII.

Troublesome as this might appear to be in terms of administration, it would be preferable, we suggest, to that view of Title VII which would demand absolute racial neutrality in every conceivable situation. If demonstrated competence alone is to be the standard, how fast will minorities make their way into the work force, what will be the pace of their advancement, and how many will be admitted in the next decade to our colleges, universities, and graduate schools?

Absolute neutrality will surely also generate a whole new wave of litigation. For example, consider the experience of Sears, Roebuck. In 1974, it was one of the primary targets of the Equal Employment Opportunity Commission. *Dun's Review*, June 1974, p. 85. Presumably to facilitate the entry of blacks and other minorities into its employment ranks it instituted "Sears Summer Internship Program for Minority Students." One Alan Roy Hollander, a white, applied for participation in the program. His application was, of course, rejected. It seems that he first sought Title VII relief from the EEOC but gave up on that avenue for some reason.[6] Instead he chose to sue *pro se* under the Civil Rights Act of 1866, 42 U.S.C. § 1981. And he "won" —that is to say his action survived a motion to dismiss by Sears in which it urged that § 1981 confers no right to sue on white persons. The United States District Court for the District of Connecticut ruled to the contrary. *Hollander* v. *Sears, Roebuck & Co.*, 392 F.Supp. 90 (March 27, 1975). The case is presently awaiting trial.

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[6] An effort to secure relief from the Connecticut Commission on Human Rights and Opportunities was unsuccessful.

What is one in Sears' position—and that actually means almost every employer in the country—to do? If it promotes a program designed to assist minorities, it may get a pat on the head from the EEOC, but it may also be sued. With successful litigants reasonably confident that their attorney's fees will be paid, 42 U.S.C. § 2000e-5(k), suits will be filed in every conceivable situation. An alternative course would be to decline to have anything to do with "affirmative action," but that would provoke the wrath of the EEOC. The only sensible answer to this dilemma is for this Court to construe Title VII along the lines we have suggested. Meaningful "equality" for disadvantaged minorities today may require some fair and reasonable measure of advantage over the majority who enjoyed an overwhelming advantage for two centuries or more. If we accorded some slight advantage to Mr. Jackson, the Petitioners in this case were not unfairly or unreasonably disadvantaged thereby and we did not violate Title VII.

II. A DISMISSED WHITE EMPLOYEE CHARGED WITH MISAPPROPRIATION OF COMPANY PROPERTY LACKS STANDING TO SUE ON GROUNDS OF RACIAL DISCRIMINATION UNDER THE CIVIL RIGHTS ACT OF 1866, 42 U.S.C. § 1981

While the broad question of a white employee's standing to sue under Title VII is not presented in this case, the question of whether the protection from racial discrimination of 42 U.S.C. § 1981 extends to white persons is squarely presented. The use of § 1981 as a means of vindicating employment rights of whites is novel to this Court for this application was not altogether apparent in 1866 and it is only recently that attempts to extend § 1981 in this fashion have been made. Of courts considering this question, at least five have indicated whites have no standing to sue under § 1981 while we are aware of only three courts which

have held to the contrary.[7] The Civil Rights Act of 1866 which was the basis for § 1981, was enacted to implement the Thirteenth Amendment, the purpose of which was to eliminate slavery and the vestiges of that condition previously imposed upon the black. An examination of the statute itself and the pertinent decisions reveals that the import of § 1981 was not to protect whites from racial discrimination but to protect blacks, and to afford blacks, not whites, with an appropriate remedy.

A. White Persons Have No Standing to Maintain an Action Under § 1981

1. The language of § 1981 directly supports the proposition that only blacks are protected against racial discrimination

It is well established that where the language of a statute is plain and unambiguous, it is the duty of the courts to enforce it as written. *United States* v. *Oregon,* 366 U.S. 643, 648 (1961); *Commissioner of Immigration of Port of New York* v. *Gottlieb,* 265 U.S. 310, 314 (1924). The language of § 1981 is clear and obvious in its prescription of a remedy for blacks against racial discrimination. It is equally clear

[7] The following cases support the view that whites do not have standing under § 1981: *Perkins* v. *Banster,* 190 F. Supp. 98 (D. Md., 1960) *aff'd,* 285 F.2d 426 (4th Cir., 1960); *Ripp* v. *Dobbs Houses, Inc.,* 366 F. Supp. 205 (N.D. Ala., 1973); *Bale* v. *United Steelworkers of America,* 6 EPD ¶ 8948, p. 6036, 6038 (W.D. Pa., 1973), *aff'd,* 503 F.2d 1398 (3rd Cir., 1974); *League of Academic Women* v. *Regents of the University of California,* 343 F. Supp. 636, 638-39 (N.D. Calif., 1972); *Kurylas* v. *Department of Agriculture,* 373 F. Supp. 1072, 1075-76 (D.D.C., 1974), *aff'd,* 514 F.2d 894 (D.C. Cir., 1975). Others holding to the contrary are: *Hollander* v. *Sears, Roebuck & Co.,* 392 F. Supp. 90 (D. Conn., 1975); *Central Presbyterian Church* v. *Black Liberation Front,* 303 F. Supp. 894 (E.D. Mo., 1969); *Gannon* v. *Action,* 303 F. Supp. 1240 (E.D. Mo., 1969), *aff'd on other grounds,* 450 F.2d 1227 (8th Cir., 1971); *WRMA Broadcasting Co.* v. *Hawthorne,* 365 F. Supp. 577 (M.D. Ala., 1973). Both *Gannon* and *Central Presbyterian Church* were decided in the same court by Judge Meredith.

and obvious that similar protection for whites was not within the contemplation of Congress.

§ 1981 reads as follows:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property *as is enjoyed by white citizens,* and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." (Emphasis supplied.)

Thus, it explicitly confirms that "all persons" shall have the same rights as those "enjoyed by white citizens." To read the word "persons" to include whites would confirm for them the enjoyment of rights they already possessed. This doesn't make any sense and a reading of the statute that reaches such a result should be avoided. *United States v. American Trucking Ass'n,* 310 U.S. 534, 543 (1940).

2. The historical setting and legislative history of the Civil Rights Act of 1866 indicate that § 1981 was intended to protect only blacks.

In view of the clarity of language of § 1981, there is no need to resort to legislative history to determine its meaning. But if its background is examined, we think it is quite clear that Congress intended to protect only blacks.

The passage of the Civil Rights Act of 1866 in the aftermath of the Civil War was intended to secure more than physical freedom for the black inhabitants of this country. It was enacted pursuant to the authority of Section 2 of the Thirteenth Amendment which empowered Congress to pass appropriate legislation to eliminate slavery, involuntary servitude and the badges and incidences of those conditions throughout the United States. The fundamental purpose was to eliminate all possible remaining vestiges of black slavery.

There is, we know, language in the legislative history that tends to support the view that whites were accorded protection against racial discrimination. But there is also significant language in the same legislative history to demonstrate the sole purpose of the Civil Rights Act was to assist the newly freed black.

The oft-cited Senator Trumbull, one of the sponsors of the measure, made the point that the legislation was intended to benefit blacks. Just prior to his introduction of the bill (S. 61), Trumbull urged its early enactment—

> "for the purpose of quieting apprehensions in the minds of many friends of freedom lest by local legislation or a prevailing public sentiment in some of the States persons of the African race should continue to be oppressed and in fact deprived of their freedom . . . ." Cong. Globe, 39th Cong., 1st Sess. 77 (1866).

Further, in reviewing the abuses that had been heaped upon the black, Senator Trumbull declared:

> "The purpose of the bill [S. 61] under consideration is to destroy all *those* discriminations, and to carry into effect the constitutional amendment." *Id.* at 474. (Emphasis added.)

That the protection of blacks was foremost in the minds of the draftsmen of this legislation is reflected elsewhere in the Congressional record. Senator Lane of Indiana felt called upon to defend the bill and the propriety of using federal authority to deal with the white man who would invoke local prejudice against the black. In doing so he commented upon the purpose of Senate Bill No. 61:

> "I think then, that the provisions of this bill are admirably calculated to secure to these colored persons their rights under the constitutional amendment." *Id.* at 603.

Representative Thayer of Pennsylvania was specifically concerned with the condition of the black, and advocated the passage of the bill for that reason:

> "The bill which now engages the attention of the House has for its object to carry out and guaranty the reality of that great measure [the Thirteenth Amendment]. It is to give to it practical effect and force. It is to prevent that great measure from remaining a dead letter upon the constitutional page of this country .... The events of the last four years ... have changed [a] large class of people ... from a condition of slavery to that of freedom. The practical question now to be decided is whether they shall be in fact freemen. It is whether they shall have the benefit of this great charter of liberty given to them by the American people." *Id.* at 1151.

Senator Howard of Michigan declared the object of the bill before the Senate:

> "It is to secure to these men whom we have made free the ordinary rights of a freeman and nothing else." *Id.* at 504.

There are many other references to the conditions of the blacks at that time. *See Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 427-28 (1968). The concern was for them, not for white men! The context of the Act and the primary concern of Congress for blacks by far overshadow any incidental comments about protecting whites one may find. At best, the legislative history of this Act on this point is ambiguous and should not be relied upon in the face of its plain wording.

3. The better view developed in a number of lower court decisions is that § 1981 does not provide a cause of action for whites to redress alleged racial discrimination

Upon a careful consideration of the wording of the statute and pertinent decisions, the court below concluded that a white person cannot sue under § 1981. We think it was correct.

A number of courts in addition to the Fifth Circuit have agreed that it would be contrary to the plain meaning of § 1981 to extend its coverage to whites. *Ripp* v. *Dobbs Houses, Inc.*, 366 F. Supp. 205, 211 (N.D. Ala., 1973); *Perkins* v. *Banster*, 190 F. Supp. 98, 99 (D. Md., 1960), *aff'd*, 285 F.2d 426 (4th Cir., 1960).[8]

In *Ripp* v. *Dobbs Houses, Inc., supra*, an action was filed by a white complaining of an allegedly illegal discharge by his employer because of his association with fellow employees of the black race. The court turned him away:

> "Plaintiff seeks to utilize this statute, which is not available to 'white citizens,' to support this Court's jurisdiction to hear his freedom of association claims. The Court will decline plaintiff's invitation to extend this statute beyond its reach.
>
> "Even in its resurrected state, Civil Rights Act of 1866 has been generally limited to its unequivocal terms. [citing *Perkins* v. *Banster, supra*] Attempts to expand Section 1981 beyond its terms have generally met with failure. ...
>
> "In summary, the Court concludes that a white plaintiff cannot rely upon 42 U.S.C. § 1981 to press claims

[8] *See Kurylas* v. *Department of Agriculture*, 373 F. Supp. 1072, 1075-76 (D.D.C., 1974), *aff'd*, 514 F.2d 894 (D.C. Cir., 1975); *Van Hoomissen* v. *Xerox Corp.*, 368 F. Supp. 829, 838, 840 (N.D. Calif., 1973); *League of Academic Women* v. *Regents of the University of California*, 343 F. Supp. 636, 638-39 (N.D. Calif., 1972).

with respect to his private employment." 366 F. Supp. at 211.

In *Bale* v. *United Steelworkers of America*, 6 EPD ¶ 8948, p. 6036 (W.D. Pa., 1973), *aff'd*, 503 F.2d 1398 (3rd Cir., 1974), the question of § 1981 protection of whites was raised again. A white worker complaining of racial discrimination by his employer and his union, was held not to have presented a cause of action, with the court specifically finding:

> "There is no jurisdiction to maintain this suit under the Civil Rights Act of 1866, 42 U.S.C. 1981, there being no allegation of racial discrimination against one who is not a white citizen." 6 EPD at 6038.

Petitioners mistakenly rely on *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), in which Sullivan, a white, alleged he was wrongfully deprived of his membership in a local community organization because of his activities in leasing his property and transferring a community organization membership to one, T. R. Freeman, a black. The two of them sued under 42 U.S.C. § 1982, a sister statute of § 1981. The Court permitted Sullivan to maintain an action under § 1982 because he was attempting to vindicate the rights of minorities, not the rights of whites:

> "We turn to Sullivan's expulsion for the advocacy of Freeman's cause. If that sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property. That is why we said in *Barrows* v. *Jackson*, 346 U.S. 249, 259, that the white owner is at times *'the only effective adversary'* of the unlawful restrictive covenant." 396 U.S. at 237. (Emphasis supplied.)

The intention of this Court was thus clearly expressed—whites had standing in this case because they were the only

"effective adversary" to contest racial discrimination against black persons.

In *Tillman* v. *Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431 (1973), as stated by Petitioners, this Court affirmed the standing of a white person to sue pursuant to § 1981 and § 1982 where the claim was based upon racial discrimination against black persons. There, a white plaintiff brought suit to vindicate the rights of a black acquaintance who had been barred by the defendant Association from use of the local swimming pool.

This Court should focus upon the nature of the underlying discrimination in those cases—discrimination against blacks. They do not support an expansion of § 1981 to protect whites in Petitioners' situation. On the contrary, they strongly imply that § 1981 applies only to discrimination against blacks.

In the present case, whites are claiming other whites have discriminated against them on the basis of their race. That was not the situation in the cases cited by Petitioners. For a white to bring a claim pursuant to § 1981 under those cases, standing would depend upon his demonstration that his claim was actually based upon racial discrimination against blacks or that his action under § 1981 was an effort to vindicate the rights of the blacks, and that no other means to vindicate those rights were available.

Petitioners also rely upon a few unique cases that have permitted whites to maintain a § 1981 action. *Gannon* v. *Action*, 303 F. Supp. 1240 (E.D. Mo., 1969), *aff'd on other grounds*, 450 F.2d 1227 (8th Cir., 1971); *Central Presbyterian Church* v. *Black Liberation Front*, 303 F. Supp. 894 (E.D. Mo., 1969); and *WRMA Broadcasting Co.* v. *Hawthorne*, 365 F. Supp. 577 (M.D. Ala., 1973). It is our view that these cases are incorrect and aberrations from the

longer line of authority refusing to permit such actions. It should also be called to this Court's attention that while the Eighth Circuit had an opportunity to decide the question of § 1981 jurisdiction in *Action* v. *Gannon*, 450 F.2d 1227 (8th Cir., 1971), it declined to affirm or deny the decision of the lower court and decided the case on other grounds.

Petitioners place primary reliance upon *Hollander* v. *Sears, Roebuck & Co.*, 392 F. Supp. 90 (D. Conn., 1975). In that case, § 1981 was read as providing a cause of action for whites as well as non-whites. The court recognized there was support for the view that § 1981 did not provide a cause of action for whites, but chose to disagree with case law to that effect on the basis that the statute was ambiguous and subject to interpretation. In *Hollander*, the court ignored the mandates of statutory construction in interpreting § 1981 by resorting to judicial interpretation of a statute clear on its face. The court's use of legislative history was inappropriate and moreover incorrect for the history of the statute as discussed in Section II(A)2 of this Brief is at best ambiguous.

Section 1981 does not afford whites any protection from racial discrimination. Nor is there any compelling reason to extend it to white persons. The availability of remedies for discrimination in employment existing under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, and the vast array of state laws adequately protect white persons.

B. Even If the Court Determines White Persons Have Standing to Invoke the Protection of § 1981, These Petitioners Have Failed to State a Cause of Action Under This Section

We submit that if this Court decides to permit whites to bring an action under § 1981, the dismissal of Petitioners'

action was proper for they failed to state a claim thereunder. As pointed out in our discussion of Title VII, a complaint must state more than superficial allegations of racial discrimination, but most allege specific, concrete facts to support a claim whether under Title VII or under § 1981. In this case, the Court is presented with the situation where the Petitioners were dismissed for a theft which they did not deny. Their complaint merely alleges that a black employee who was charged with theft, was not discharged. For the Court to allow whites to maintain a § 1981 action without pleading more, the Court would throw wide the door to innumerable and frequently unmeritorious lawsuits.

In determining what is needed to state a cause of action under § 1981, it may be instructive for this Court to examine the decision of the court in *Schoonfeld* v. *Mayor and City Council*, 399 F. Supp. 1068 (D. Md., 1975), when faced with a problem similar to the case at bar.

In *Schoonfeld*, a white former city jail warden, Schoonfeld, claimed he was discharged by his employers because he was white and because defendants wished to replace him with a black. Schoonfeld thereafter attempted to maintain an action under 42 U.S.C. § 1985(3), a statute similar in purpose to 42 U.S.C. § 1981. In that case, the court considered the standards necessary for a *white* plaintiff to maintain an action. It noted that mere allegations of discrimination are insufficient, and enumerated the complaint's deficiencies:

> "In the instant case the facts alleged do not show any class-based discrimination. Unlike *Action* v. *Gannon*, *supra*, there is no allegation of any ongoing discriminatory activity, nor is there any allegation of a systematic pattern of discrimination . . .
>
> "This is not a case of discharge of a white public official by an all-black board. . . ." *Id.* at 1086.

The factors isolated by the court as necessary to a complaint of racial discrimination were lacking in *Schoonfeld* and are lacking in the case of the Petitioners. They do not claim that the charge of misappropriation was in any sense a pretext by us in order to discharge and punish them for their status as white men. Rather, the only allegation is that a black was treated differently from themselves.

The Maryland District Court recognized that there was no merit in allowing a white to advance a claim based upon his dismissal by a basically white group of public officials, where the replacement was a white selected by racially neutral procedures. In order to avoid such frivolous claims, this Court should similarly recognize conclusory allegations are not enough and that specific facts to support an allegation of discrimination are necessary to set forth a claim under § 1981.

This Court may establish different criteria for an action by a white person as opposed to a black under § 1981. If this Court wishes to extend § 1981, it should do so only insofar as any benefits of such extension outweigh the significant detriment to an employer's affirmative action efforts as previously discussed in this Brief regarding Title VII. There is little reason for an extension of § 1981 to protect the white Petitioners in the circumstances of this case.

Conclusion

For the foregoing reasons, the decision of the Court of Appeals under review was correct. Accordingly, this Court should affirm that decision. If it is determined that white persons have standing to invoke 42 U.S.C. § 1981, we suggest that this Court affirm the result reached in the court below on the ground that Petitioners failed to state a claim upon which relief could be granted.

Respectfully submitted,

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